

**DI DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM NEGERI WILAYAH PERSEKUTUAN KUALA LUMPUR**

NO. KES: WA-22IP-25-04/2020

ANTARA

MUHAMMAD HAFIDZ BIN MOHD DUSUKI ... PLAINTIF

DAN

HASSAN BIN ZULKIFLI ... DEFENDAN

GROUND

INTRODUCTION

[1] This appeal is against my dismissal of the Defendant's application pursuant to O. 57 r. 1(4)(a) of the Rules of Court 2012 ("ROC") for the current suit filed by the Plaintiff against him to be transferred to the Kota Bharu High Court. Below are my grounds for the dismissal.

BACKGROUND

[2] In her oral submission, the learned counsel for the Defendant argued that the Defendant's application was specifically made pursuant to O. 57 r. 1(4)(a), for this Court to transfer the current suit filed by the Plaintiff against the Defendant to be transferred to the Kota Bharu High Court, having fulfilled the requirements under paragraphs (A), (B) and (E) of that provision.

[3] The Defendant's supporting affidavit averred that the alleged infringement of the Plaintiff's artworks arose at the Defendant's place of residence in Tumpat, Kelantan, and that the Defendant's place of business and residence are both in Tumpat, Kelantan. The Plaintiff's cause of action, alleged facts and incidences that led to the Plaintiff's suit against the Defendant had all arose in Kelantan. The Defendant's witnesses and most significantly, the Defendant's father, who would be called as the Defendant's main witness in the trial, are all residing in Kelantan.

[4] Aside from those averments, the learned Counsel for the Defendant further intimated in her submission that this Court should take judicial notice that the Defendant's father is now 75-years old and due to the

current Covid-19 pandemic it would render it unsuitable for the Defendant's father to travel to Kuala Lumpur to attend court proceedings as he belonged to the high-risk group.

FINDING

Preliminary Objection

[5] At the outset, the Defendant's counsel had raised her preliminary objection on the Plaintiff's affidavit and mooted the idea that it is simply untenable for the Plaintiff to have affirmed his 1st affidavit-in-reply before a Commissioner for Oath on the date affixed on that affidavit, 27/5/2020, as that date fell within the period of the Conditional Movement Control Order ("CMCO") imposed by the Government.

[6] When queried by this Court, the Defendant's counsel informed that the Defendant was not questioning that the said affidavit was affirmed and signed by the Plaintiff. The Defendant's query was as to how the Plaintiff, who is residing in Kelantan, was able to undertake an inter-state travelling to have the said affidavit being affirmed before a Commissioner for Oath in Bandar Baru Bangi in Selangor, when the CMCO was in operation at that material time. The counsel argued that the said affidavit should

therefore be expunged as it did not comply with the mandatory requirement of O. 41 r. 1 of the ROC.

[7] This Court had dismissed the preliminary objection. Firstly, this Court was satisfied that the letter dated 22/5/2020 issued by the Plaintiff's counsel to the Plaintiff (see exhibit MHD-1 to the Plaintiff's 2nd affidavit-in-reply dated 25/6/2020 in enclosure 22) had sufficiently proved the fact that the Plaintiff had in actual fact travelled inter-state to, *inter alia*, have his impugned 1st affidavit-in-reply appropriately affirmed. The necessity for the Plaintiff to conduct the said travelling during that period was supported by his lawyer's letter, in line with the requirements in place during the CMCO.

[8] This Court further ruled that whilst the Defendant's counsel was correct in pointing out that apart from the lawyer's letter, an authorisation letter from the Royal Malaysian Police ("RMP") is required to enable the Plaintiff to conduct the said inter-state travel, this Court can allow such affidavit to be used in evidence notwithstanding any irregularity in its form: O. 41 r. 4 ROC. The main consideration that this Court would need to ascertain is whether the said failure or omission, if any, was a defect which only went to the form and not to the substance of the affidavit and that such a defect had not occasioned any substantial injustice : See Clement

Skinner J's decision in *Re Liow Fong Mooi, Ex P Malayan Banking Bhd* [2000] 6 CLJ 63. This Court found the Plaintiff's failure to adduce the RMP's letter tantamount to a non-substantial irregularity that had not occasioned any substantial injustice to the Defendant.

[9] On the above grounds, I dismissed the preliminary objection.

Are the reasons intimated by the Defendant good grounds for this Court to order a transfer?

[10] The law on transfer of proceedings is trite. The underlying jurisprudence on the transfer of proceedings is found in the provisions of subsection 23(1) of the Court of Judicature Act 1964 ("CJA"), read together with paragraph 12 of the Schedule to that Act, and O. 57 r. 1 of the ROC. In *Abdullah bin Haji Lamat* [1993] MLJU 329, the Court held that the jurisdiction under O. 57 r. 1 must be exercised judicially and shall have regard to all circumstances of the case, inter alia, *forum non conveniens*, the financial position and hardship of the Defendant, the Defendant's ability to defend the action at the transferred court and the Plaintiff's waiver of his right to sue in the transferred court.

[11] In exercising the discretionary power to consider whether or not to invoke the transfer under O. 57 r. 1, the factors set out thereunder must be taken into account. It is also of significance to observe that no one single factor will prevail over the other. For the Court must weigh all the factors relied on in making a decision as to whether the application ought to be favorably considered: ***POSC TI Sdn Bhd v. Kerajaan Negeri Terengganu & Anor*** [2015] 1 LNS 1416; [2016] 10 MLJ 663.

[12] Within the context of the Defendant's application, applying the said subsection 23(1) of the CJA and paragraph 12 of the Schedule to that Act, and O. 57 r. 1(4)(a) to be read together with paragraphs (A), (B) and (E) to O. 57 r. 1(4), if this Court decides to allow the application, this Court must be satisfied that-

- (i) the Kota Bharu High Court is located at or nearest to the place where the cause of action arose;
- (ii) the Kota Bharu High Court is located at or nearest to the place where the defendant resides or has his place of business; or
- (iii) for other reasons it is desirable in the interests of justice that the proceedings should be transferred.

[15] Consequently, whilst the issue of *forum non conveniens* does not apply between the two High Courts, this issue is applicable as between the courts within the said local jurisdiction.

[16] In *Lim Guan Eng v FZ Sdn Bhd*, [2015] 8 MLJ 469, it was held that just the fact that the 1st Defendant company was situated in Petaling Jaya and the 2nd Defendant resided in Cyberjaya were not sufficient grounds to transfer the case from Penang to Shah Alam. Thus, I do not regard the fact that the Defendant is residing in Kelantan and has his business in Kelantan per se as sufficient ground to allow his transfer application. Similarly, the fact that the Defendant's father is of old age and would be difficult to travel due to the Covid-19 pandemic cannot form the basis for this Court to allow the application. This Court is cloaked with sufficient powers and can allow flexibility towards the said person by dispensing his attendance and resort to technology for his evidence-taking.

[17] It must be emphasized that subparagraph (E) of O.57 r.1(4) provides a rather wide discretion to the Court to determine whatever reasons it deems fit and appropriate to allow or disallow any application

[13] In the instance such as before this Court now, where the two High Courts of concurrent jurisdiction in issue are in two separate local or territorial jurisdiction, one being here in Kuala Lumpur and the other in Kota Bharu, the issue of *forum non conveniens* is of utmost importance. In such instance, this High Court - before which the civil proceedings are first filed - remains seised of jurisdiction. This followed the principle laid down in ***Siti Aishah bt Ishak v. Golden Plus Holdings Bhd [2017] 8 CLJ 272; [2017] 3 MLJ 701***, where the Court of Appeal held:

"The issue of forum conveniens does not arise where any one of the two High Courts is properly seised with local or territorial jurisdiction. That principle arises only where any of the two High Courts, having jurisdiction over the civil proceedings is considering whether the proceedings are more conveniently tried by the same High Court but sitting in another part of its local jurisdiction or territory.

The issue of forum conveniens cannot arise where both High Courts have local or territorial jurisdiction over the same proceedings because of the peculiar terms of Article 121(1) conferring on both High Courts co-ordinate jurisdiction. Where the principle of forum conveniens is correctly invoked, it frequently resounds in the order of a transfer of proceedings to the other Court. With the jurisdiction of both High Courts being co-ordinate and the lack of express power or legislation to transfer proceedings between the two High Courts, the High Court before which the civil proceedings are first filed and where any one of the requirements of section 23(1) is met, remains seised of jurisdiction."

[14] The meaning of the phraseology "local jurisdiction" and "territorial jurisdiction" as defined in s. 3 of the CJA had been sufficiently dealt with in a long line of authorities, as far back as the High Court decisions in ***Syarikat Nip Kui Cheong Timber Contractor v. Safety Life*** and

General Insurance Co Sdn Bhd, Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1975] 1 LNS 173 that was affirmed by the Federal Court in ***Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1***. In ***Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2014] 1 CLJ 18; [2014] 6 MLJ 189*** and ***Hap Seng Plantations (Rivers Estates) Sdn Bhd v. Excess Interpoint Sdn Bhd & Anor [2016] 4 CLJ 641; [2016] 3 MLJ 553***, the Federal Court had further reaffirmed its earlier rulings on the same that could be simplified as follows:

- (i) there exists two distinct High Courts, the High Court in Malaya, and the High Court in Sabah and Sarawak;
- (ii) each of that High Courts has its corresponding, separate and distinctive "local jurisdiction" which is interpreted to mean -
 - (a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Selangor, Terengganu and the Federal Territory of Kuala Lumpur;
 - (b) in the case of Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan; and
- (iii) the High Courts in Malaya does not assume jurisdiction over the High Courts in Sabah and Sarawak, and *vice versa*.

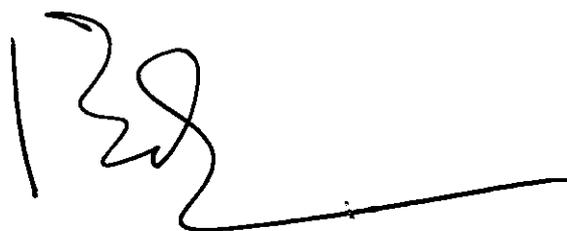
for transfer, provided such reason shall fulfill the end purpose of O.57 r.1 viz. ensuring the interest of justice of both parties.

[18] This Court also took cognizance of the fact that the Judiciary had moved positively towards the establishment of specialised courts dealing with intellectual property beginning with the designation on 17/7/2007 of six (6) High Courts in Kuala Lumpur, Johor, Perak, Selangor, Sabah and Sarawak to deal with civil intellectual property cases infringements. By virtue of the Chief Judge of Malaya's Administrative Directive Order dated 3/12/2019, the specialised Intellectual Property High Court in Kuala Lumpur deals with all intellectual property cases registered in Kuala Lumpur and Selangor. This Court agrees with the submission of the learned counsel for the Plaintiff that such move could encourage expeditious, consistent and efficient disposals of intellectual property cases and contribute positively towards the development of Malaysian jurisprudence on intellectual property law.

[19] The law is therefore clear, that for this Court to allow or disallow the transfer of this case to the Kota Bharu High Court, it is paramount for me to consider the interest of justice of both parties.

[20] Having considered all the above, I concluded that the interest of justice of both parties called for this Court to disallow this application. So I ordered.

DATED THIS 5TH NOVEMBER 2020

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line extending to the right.

**(MOHD RADZI BIN HARUN)
JUDGE
INTELLECT PROPERTY DIVISION
KUALA LUMPUR HIGH COURT.**

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